Fullji Realty Sdn Bhd v Lim Yong Meng

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–166 OF 1998
KANG HWEE GEE J
22 DECEMBER 2006

Contract — Breach — Breach of warranty of authority — Purported sale and purchase of land by an imposter vendor — Whether solicitor warranted to the buyer that he was authorized to act for the vendor — Significance of letters signed by the solicitor claiming to act for the vendor

This judgment projects what would have been the decision had the parties failed to settle their case. It is therefore *ex post facto* and is not binding on the parties. The plaintiffs claim against the defendant is for loss suffered in consequence of the defendant's breach of warranty of authority in a purported sale and purchase of a land by an imposter ('the imposter') who claimed to be the registered proprietor and whom the defendant had acted as solicitor. The defendant took out a third party claim for indemnity and contribution against the third party, the solicitor who acted for the purchaser. The plaintiff submitted that there was an implied authority flowing from the defendant solicitor to the plaintiff purchaser that he had the authority to represent the principal, that is to say the person who claimed to be the owner and thereby induced the purchaser to enter into the sale and purchase agreement with the plaintiff in consequence of which the plaintiff suffered the loss. The defendant submits that the alleged representation did not originate from the defendant at his office. It was the plaintiff and the imposter who came to see the defendant at his office after the plaintiff had agreed to purchase the land from the imposter.

Held:

(1) To constitute a breach of warranty of authority the defendant must have warranted to the plaintiff that he was authorized to act for the registered proprietor to sell the land and in consequence thereof induced the plaintiff to sign the option agreement and sale and purchase agreement and to part with its money. The evidence clearly indicates that this was not the case. The plaintiff had already made up its mind to purchase the land from the imposter before the parties went to see the defendant at his office (see paras 23–24).

(2) Therefore at no time did the defendant ever warrant to the plaintiff that he was authorized to act for the vendor to sell the land. The defendant's only duty under the circumstances, was confined merely to making sure to the extent that his visual faculty allowed that the land title and the temporary identity card carried by the imposter say what they purport to say before committing himself

to attest the signature of the vendor in the option agreement and the sale and purchase agreement. He had discharged that duty admirably (see paras 26–27).

(3) The two letters signed by the defendant wherein the defendant had claimed to act for the vendor were irrelevant and insignificant in so far as they purport to warrant that the defendant was authorized to act for the vendor for it cannot be well nigh said that they constitute an express warranty on the part of the defendant which had induced the plaintiff to pay the money to the defendant. When the letters were written, the parties had by themselves agreed to purchase the land. All that can be said of the letters at most is they purport to claim that the defendant was authorized to act for matters after the event - that is to say after the plaintiff had already on its own been deceived by the imposter (see para 28).

[Bahasa Malaysia summary

Penghakiman ini menggambarkan apa yang sepatutnya menjadi keputusan jika pihak-pihak tidak menyelesaikan kes mereka. Dengan itu ia adalah *ex post facto* dan tidak mengikat pihak-pihak. Tuntutan plaintif-plaintif terhadap defendan adalah untuk kerugian yang dialaminya yang disebabkan oleh perlanggaran waranti kuasanya kononnya dalam satu pembelian dan penjualan tanah oleh seorang penyamar (selepas ini dirujuk sebagai 'penyamar tersebut') yang mendakwa dirinya sebagai pemilik berdaftar dan dimana defendan mewakilinya sebagai peguamcara. Defendan mengeluarkan satu tuntutan pihak ketiga untuk indemniti dan sumbangan terhadap pihak ketiga, peguamcara yang mewakili pembeli. Plaintif menghujahkan bahawa terdapat satu kuasa tersirat daripada peguamcara defendan kepada pembeli plaintif bahawa ia mempunyai kuasa untuk mewakili penyamar tersebut, iaitu orang yang menyatakannya sendiri sebagai pemilik dan dengan itu mendorong pembeli memasuki satu perjanjian jual beli dengan plaintif dimana akibatnya plaintif mengalami kerugian. Defendan menghujahkan bahawa representasi yang didakwa tidak berpunca daripada defendan di pejabatnya. Ia adalah plaintif dan penyamar tersebut yang datang kepada defendan dipejabatnya selepas plaintif bersetuju membeli tanah tersebut daripada penyamar tersebut.

Diputuskan:

(1) Untuk membentuk satu perlanggaran waranti kuasa, defendan mesti memberi jaminan kepada plaintif bahawa beliau diberi kuasa untuk bertindak bagi pihak pemilik berdaftar untuk menjual tanah dan akibat dari situ mendorong plaintif menandatangani perjanjian opsyen dan perjanjian jual beli dan melepaskan wangnya. Bukti jelas menunjukkan ini bukan kesnya. Plaintif telahpun membuat keputusan untuk membeli tanah tersebut daripada penyamar tersebut sebelum pihak-pihak menemui defendan di pejabatnya (lihat perenggan 23–24).

(2) Dengan itu defendan tidak pernah memberi jaminan kepada plaintif bahawa ia diberi kuasa untuk bertindak bagi pihak penjual untuk menjual tanah tersebut. Kewajipan defendan dalam keadaan ini hanya untuk memastikan bahawa surat hakmilik tanah dan kad pengenalan sementara penyamar tersebut

menyatakan apa yang sepatutnya dinyatakan sebelum menyaksikan tandatangan penjual di perjanjian opsyen dan perjanjian jual beli tersebut. Beliau telah menjalankan kewajipan tersebut (lihat perenggan 26–27).

(3) Kedua-dua surat yang ditandatangani oleh defendan di mana defendan menyatakan ia bertindak bagi pihak penjual adalah tidak relevan dan tidak penting sejauh mana ia memberi jaminan kepada defendan bahawa ia diberi kuasa untuk bertindak bagi pihak penjual oleh kerana ia tidak boleh dikatakan membentuk satu waranti secara nyata di pihak defendan yang mendorong plaintif membayar wang kepada defendan. Apabila kedua-dua surat tersebut ditulis, pihak-pihak sendiri telah bersetuju untuk membeli tanah tersebut. Apa yang dapat dikatakan berhubungan dengan surat-surat tersebut paling lebih, ialah ia kononnya menyatakan bahawa defendan diberi kuasa bertindak atas perkara-perkara selepas kejadian — iaitu selepas plaintif sendiri telah ditipu oleh penyamar tersebut (lihat perenggan 28).]

Notes

For a case on breach of warranty of authority, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) para 2245.

Cases referred to

Lau Tek Sen @ Lau Beng Chong & 3 Ors v SK Song [1995] 2 AMR 1225; [1995] MLJU 302 (distd)

Yonge v Toynbee [1910] 1 KB 215 CA (distd)

Legislation referred to

Civil Law Act 1956 s 10
Contracts Act 1950 s 188
Rules of the High Court 1980 O 15 r 6, O 16 r 1

Gana Muthusamy (Gana Muthusamy & Co) for the plaintiff.
Krishnan (Kris Edward & Derek) for the defendant.
Porres Royan (Shook Lin & Bok) for the third party.

Kang Hwee Gee J:

PROLOGUE

[1] This judgment projects what would have been my decision had the parties failed to settle their case on 21 December 2006.

[2] On the 21 December 2006 counsel for the defendant En Mohd Faizul informed the court that the parties had settled on their terms which were duly recorded by the court.

[3] This judgment reflects what I would have decided had the parties failed to settle its suit. It is therefore ex post facto and is not binding on the parties.

[4] The plaintiffs claim against the defendant is for loss it suffered in consequence of the defendant's breach of warranty in a purported sale and purchase of a land by an imposter who claimed to be the registered proprietor and whom the defendant had acted as solicitor. **A**

[5] The defendant took out a third party claim for indemnity and contribution against the third party, the solicitor who acted for the purchaser. **B**

THE FOLLOWING FACTS ARE NOT IN DISPUTE

[6] Plaintiffs claim against the defendant is based on breach of warranty of authority under a contract for the sale and purchase agreement between the plaintiff and a person who had falsely claimed to be the registered proprietor of the land. **C**

[7] The defendant was the solicitor acting for the alleged vendor (the person who falsely claimed to be the registered proprietor). **D**

[8] The plaintiffs action is confined to the breach of warranty of authority by the defendant who had acted for the person who claimed to be the proprietor.

[9] There is an implied authority from the defendant to the purchaser that he had the authority to represent the principal (the person who falsely claimed to be the owner) to enter into the sales and purchase agreement (see *Yonge v Toynbee* [1910] 1 KB 215 (CA) at p 231; s 188 of the Contracts Act 1950; Mohd Ghazali Yusoff JC (as he then was) in *Lau Tek Sen @ Lau Beng Chong & 3 Ors v SK Song* [1995] 2 AMR 1225; [1995] MLJU 302. **E**

It is common ground: **F**

(1) that the plaintiff, alleged vendor (the person who claimed to be the selling imposter) first met at the office of the third party lawyer;

(2) the plaintiff had earlier met a land broker who had wanted to sell the said land for the proprietor; **G**

(3) the plaintiff and the imposter (accompanied by two other persons) met at third party's counsel office;

(4) the third party En Lim examined the documents;

— temporary IC of the imposter, **H**

— title deed alleged to be false;

(5) when third party lawyer came to know that the 'owner' was present he immediately stopped dealing with the imposter, so as to avoid conflict of interests; **I**

(6) third party lawyer contacted defendant to act for the vendor as third party lawyer wanted to act only for the purchaser;

(7) the plaintiff and the imposter (with the other person) went to defendant's office to conclude and execute the agreement.

A THE BASIS OF THE PLAINTIFF'S CLAIM

[10] At the end of the trial, the plaintiff confined its claim to an action of implied breach of warranty of authority on the part of the defendant solicitor who claimed to have acted for the registered proprietor.

B

[11] It is submitted by counsel for the plaintiff Mr Gana that there was an implied authority flowing from the defendant solicitor to the plaintiff purchaser that he had the authority to represent the principal, that is to say the person who claimed to be the owner and thereby induced the purchaser to enter into the sale and purchase agreement with the plaintiff in consequence of which the plaintiff suffered the loss.

C

[12] Mr Gana relied on the English Court of Appeal case of *Yonge v Toynbee* [1910] 1 KB 215 which states the law as per Swinfen Eady J at p 231:

D

> Where an agent represents that he has authority to do a particular act, and he has not such authority, and another person is misled to his prejudice, the ground upon which the agent is held liable in damages is that there is an implied contract or warranty that he had the authority which he professed to have. It would seem to follow from this, in principle, that, where the authority upon which an agent is professing to act is a continuing authority, there is a continuing representation by him that he has authority to do the series of acts, and an implied contract or warranty that he possesses such authority. In *Firbank's Executors v Humphreys* 18 QBD 54, at p 60 the law is thus stated by Lord Esher: 'The principle of *Collen v Wright* 8 E&B 647 extends further than the case of one person inducing another to enter into a contract. The rule to be deduced is, that where a person by asserting that he has the authority of the principal induces another person to enter into any transaction which he would not have entered into but for that assertion, and the assertion turns out to be untrue, to the injury of the person to whom it is made, it must be taken that the person making it undertook that it was true, and he is liable personally for the damage that has occurred.' And Lindley LJ said 18 QBD 54, at p 62: Speaking generally an action for damages will not lie against a person who honestly makes a misrepresentation which misleads another. But to this general rule there is at least one well established exception, namely, where an agent assumes an authority which he does not possess, and induces another to deal with him upon the faith that he has the authority which he assumes.

E

F

G

[13] Per Mohd Ghazali bin Mohd Yusoff, JC (as he then was) in *Lau Tek Sen @ Lau Beng Chong & 3 Ors v SKSong* [1995] 2 AMR 1225; [1995] MLJU 302 at 'Held':

H

1(a) The definition of 'warranty' in s 12(3) and (4) in the Sale of Goods Act 1957 is a useful aid in the determination of what a warranty is. [see p 1233 lines 24–42]

(b) It is clear from the facts that the defendant bona fide believed from the beginning that he had authority to act for the true registered owner, as he had reasonable grounds to believe that his client was TNK, the true registered owner of the said land. There was no reason for the defendant to suspect that his client was not who he said he was. [see p 1235 lines 41 to p 1236 line 6]

I

(c) Notwithstanding this belief, in fact, the defendant did not have the authority of the true registered owner to act in the agreement of the sale. Inactions for breach of warranty, the defendant cannot raise the defence of being misled by his client. The defendant's liability arises not from any wrong or omission of right on his part,

but from an implied undertaking or promise made by him that the authority which he professes to have, does in point of fact, exist, regardless of whether there was fraud. [see p 1236 line 9 to p 123 7 line 46]

(d) By acting for a person who had masqueraded as the registered owner of the said land, the defendant became the solicitor responsible for that person; the correspondence shows that the defendant had represented that his client was the registered owner, and therefore qualified to sell the said land. [see p 1238 lines 1–5]

(e) The plaintiffs had been induced to enter into the agreement by the defendant's assertion that he had the authority of the registered owner. Since the assertion turned out to be untrue, to the plaintiffs' disadvantage, it must be taken that when the defendant made the assertion, he undertook that it was true. Therefore, the defendant is personally liable for any resulting damage. [see p 1238 lines 26–34]

(f) The defendant's cautiousness in acting for his client, including the search etc. is not relevant as the defendant had, from the outset of the transaction, warranted that he was acting for the true registered owner of the land. [see p 1238 line 35 to p 1239 line 22]

(g) Generally, it is not the duty of the purchaser's solicitor to make a further search before the balance of the purchase price is paid to the vendor; although such a search may be appropriate in certain circumstances e.g., where it is known that there could be other claimants to the property, which claims are not reflected in the Register. [see p 1239 lines 28–34]

2(a) The defendant is also liable for the tort of negligence as he owed a duty of care to the plaintiffs, and the duty existed during the pre-contractual negotiations up to the making of the written contract. The defendant's representation throughout the transaction that he had the authority to act for the true registered owner was a negligent representation. The defendant owed a duty to take reasonable care to ensure that his representation was correct. [see p 1242 lines 21–43]

3(a) The plaintiffs cannot recover the market value of the said land less the contract price as such a loss is too remote. The defendant's client never had ownership or interest in the said land and therefore had nothing that could constitute something that the plaintiffs lost by being unable to sue the defendant's client. The agreement of sale is unenforceable against the defendant's client. Consequential losses from non-performance of the agreement for sale does not have any relevance as the title held by the defendant's client was defeated under s 340(2) of the National Land Code when the true owner obtained a court order declaring it null and void. The defendant's client did not have any title to pass. [see p 1246 lines 1–27]

(b) Under contract and tort, the plaintiffs are entitled to RM24,225 (30% part payment of purchase price paid on 1 April 1981), RM56,525 (balance of purchase price paid on 1 July 1981). RM1,615 (broker's fees) and RM1,700 (costs and disbursements towards plaintiffs' solicitors). Interest to be calculated at 6% pa from dates those sums were expended until date of judgment, and interest at 8% pa on the total sum from date of judgment to realisation. [see p 1246 line 34 to p 1247 line 15]

[14] The defendant it was submitted made representation to the plaintiff at defendant's office that he was acting for the true registered proprietor of the land; but for the representation the plaintiff would not have signed the agreement.

[15] Mr Gana submits that the following evidence of the defendant in cross-examination points to a case of an implied warranty of authority on the part of the defendant:

Evidence of implied warranty: Defendant's cross-examination:

I agreed to act for Baskaran (imposter) after my former client rang me up to ask me to act.

Earlier third party lawyer had called defendant and he had not agreed to act. But when his former client called up to urge him to do so, he agreed to act for the imposter (Baskaran).

The third party lawyer then called defendant again. And the defendant now agreed to act.

They then proceeded to defendant's office.

[16] It is also clear from the following letters of the defendant that he had acted for the person who sold the land:

JIMMY LIM & CO
ADVOCATES & SOLICITORS
(PEGUAMBELA & PEGUAMCARA)
No. 15A (1' Floor), Jalan Permas 4/4, Permas Jaya,
81750 Johor Bahru,
Tel: 07-3878948 Fax: 07-3878949

LIM YONG MENG LLB (HONS) LONDON BARRISTER (LINCOLN'S INN)

Our Ref: JL/CV/1135/96

Date: 27 November 1996

M/S Leng & Co,

Advocates & Solicitors,

Johore Bahru.

ATTENTION: MR LIM ENG SIANG

Dear Sirs,

Re:Sale & Purchase of property held under HS (M) 823 MLO 2529 Mukim of Tebrau

Purchase Price: RM850,000

Vendor: BASKARAN PILLAY S/O SANGARAN PILLAY

Purchaser: FULJI REALTY SDN BHD

We act for En Baskaran Pillay s/o Sangaran Pillay, the registered owner of the above property.

We enclose herewith a copy of the option dated 27 November 1996 duly executed by our client for your attention.

Kindly forward to us the fair copies of the agreement of sale & purchase together with the balance deposit of RM252,000 to reach us by 1 pm on 3 December 1996.

Please acknowledge receipt.

Yours faithfully,

Sgd

Encl

JIMMY LIM & CO
ADVOCATES & SOLICITORS
(PEGUAMBELA & PEGUAMCARA)
No. 15A (1' Floor), Jalan Permas 4/4, Permas Jaya,
81750 Johor Bahru,
Tel: 07-3878948 Fax: 07-3878949

LIM YONG MENG LLB (HONS) LONDON BARRISTER (LINCOLN'S INN)

Your Ref: LES/ec/C 3694/9611

Our Ref: JL/CV/1135/96

Date: 3 December 96

M/S Leng & Co,

Advocates & Solicitors,

Johore Bahru.

Dear Sirs,

Property: H.S.(M) 823 MLO 2529 Mukim Tebrau

Purchaser: FULJI REALTY SDN BHD

Vendor: BASKARAN PILLAY S/O SANGARAN PILLAY

We thank you for your letter of the second instant.

As requested we enclose herewith the following documents for your attention:

(a) Seven (7) copies of the sale & purchase agreement duly executed by our client on your undertaking to forward to us two (2) stamped copies thereof for our client's retention.

(b) Original Memorandum of Transfer duly executed by our client.

(c) Seven (7) copies of the valuation forms duly executed by our client.

(d) A photostat copy of the above title deed.

(e) A photostat copy of the quit rent receipt for year 1996.

We confirm that the above original title deed has been deposited with us in accordance with cl 20(1) of the special conditions.

Please note that the agreement of sale & purchase are forwarded to you strictly on your undertaking not to release the agreement to your client until your client's cheque has been cleared by the bank concerned. Our client's execution of the agreement of sale & purchase herein is subject to the bank clearance of your client's DCB cheque No 175188.

Please acknowledge receipt.

Yours faithfully,

Sgd

Encl

cc Client.

THE POSITION TAKEN BY THE DEFENDANT

[17] Counsel for the defendant, Mr Krishnan submits that *Yonge v Toynbee* and *Lau Tek Sen Lau Tek Sen @ Lau Beng Chong & 3 Ors v SK Song* must be distinguished from the instant case in that the alleged representation did not originate from the defendant at his office.

[18] It was the plaintiff and the imposter (with the other person) who came to see the defendant at his office after the plaintiff had agreed to purchase the land from the imposter. This is clear from the following evidence in cross-examination of the plaintiff:

I do not agree that the sale price was below market value — to me it was reasonable value.

All three of us together with the Chinese person went out with the option prepared by Lim to see Jimmy Lim in his office.

I signed the option together with the vendor. I paid sum of RM3,000 to vendor in cheque.

The basic teens and conditions of the sale were incorporated into the option. All these transactions were completed by about 6 to 7 o'clock in the evening on the same day (27 November 1996).

My lawyer then (later) prepared the S&P within a week of 27 November 1996, ie by 2 December 1996.

Balance of deposit of RM252,000, seven copies of S&P, memorandum of transfer duly signed by me, were sent to Jimmy Lim's office.

As far as I and my lawyer go everything was going smoothly. There was no hitch — but he did not tell me anything adverse of the property. He did not stopped me from buying the property.

He felt that the document were in order.

I do not know if any amendment was made by Jimmy Lim to the S&P

Also this is clear from evidence of third party at p 38 of NE:

Exh PI: Title — I looked into this title to see the name was there, title numbers were correct; acreage was correct. I did peruse through the whole title.

After perusing through it, I had no reason to believe that the title was not genuine.

I was therefore in a position to advise my client that he may go ahead to purchase the property.

There was nothing at that point of time to advise him not to buy the property.

No presentation of the memorandum of transfer was attempted at the land office as subsequently it was established that the sale was by an imposter.

I agree the NRIC was flawed. The person selling was not the right person.

Had the presentation been made in the land office, it could have been registered as the attestation was there, barring any caveat on the property. As it transpired there was a caveat on the property lodged subsequently after the S&P was executed and the deposit paid.

THE POSITION TAKEN BY THE THIRD PARTY

[19] Mr Royan counsel for the third party submits that:

[20] The third party is liable to indemnify or contribute only if the plaintiff succeeds in its claim against the defendant.

[21] With respect to the defendant's claim for contribution this can only arise in tort under s 10 of the Civil Law Act 1956 which reads as follows:

10. Proceedings against, and contribution between, joint and several tortfeasors

(1) Where damage is suffered by any person as a result of a tort (whether a crime or not) —

(a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;

(b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the court is of opinion that there was reasonable ground for bringing the action;

(c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage, and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section —

(a) the expressions 'parent' and 'child' have the same meanings as they have for the purposes of s7; and

(b) the reference in subsection (1)(b) to 'the judgment first given' shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall —

(a) affect any criminal proceedings against any person in respect of any wrongful act; or

(b) render enforceable any agreement for indemnity which would not have been enforceable if this section had not been enacted.

[22] Given the fact that the plaintiffs claim against the defendant is now only confined to a claim in contract, the third party is not liable to make any contribution should the plaintiff succeed in its claim against the defendant and the defendant succeeds in proving that the third party had contributed to the loss.

[23] With respect to the defendant's claim for indemnity, this can only be allowed in contract and only if there is in existence a contract of indemnity between the defendant and the third party. It was submitted that there was no such contract between the defendant and the third party whereby the third party is obliged to indemnify the defendant against any claim that the plaintiff may make against the defendant.

THE DEFENDANT'S REPLY TO THIRD PARTY

[24] Third party's liability is governed by O 16 r 1 Rules of the High Court 1980 which reads as follows:

1. Third party notice (O 16 r 1)

(1) Where in any action a defendant who has entered appearance:

(a) claims against a person not already a party to the action any contribution or indemnity; or

(b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action;

(d) then, subject to paragraph (2), the defendant may issue a notice in Form 22 or 23, whichever is appropriate (in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

(2) A defendant to an action may not issue a third party notice without the leave of the Court unless the action was begun by writ and he issues the notice before serving his defence on the plaintiff.

(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.

[25] It is submitted that the court is competent to determine on the evidence as presented whether the third party is independently liable to the plaintiff without having to restrict itself to decide on the narrow question of whether the third party

is liable to indemnify or make contribution to the defendant in the event the court finds the defendant liable.

FINDINGS AND DECISION

[26] Having heard the submission of the parties my findings are as follows:

[27] To constitute a breach of warranty of authority the defendant must have warranted to the plaintiff that he was authorized to act for the registered proprietor to sell the land and in consequence thereof induced the plaintiff to sign the option agreement and sale and purchase agreement and to part with its money.

[28] The evidence clearly indicates that this was not the case. The plaintiff had already made up its mind to purchase the land from the imposter before the parties went to see the defendant at his office. In fact the plaintiff had made up his mind to purchase the property even before going to the office of the third party.

[29] The narrative clearly supports the fact that the parties (consisting of plaintiff, the imposter and the other persons accompanying the imposter) had gone to see the defendant only for the purpose of appointing the defendant to act for the vendor, having earlier decided between themselves and the solicitor of the purchaser (the third party) that the defendant should act for the registered proprietor. It is therefore well nigh impossible to conclude that the defendant had warranted to the plaintiff that he was authorized to act for the registered proprietor to sell the land.

[30] I would therefore have to agree with the submission of counsel for the defendant that at no time did the defendant ever warranted to the plaintiff that he was authorized to act for the vendor to sell the land. The instant case can be distinguished on the facts from the *Yonge* and the *Song*'s cases cited by counsel for the plaintiff.

[31] The defendant's only duty under the circumstances, was confined merely to making sure to the extent that his visual faculty allowed that the land title and the temporary identity card carried by the imposter say what they purport to say before committing himself to attest the signature of the vendor in the option agreement and the sale and purchase agreement. He had discharged that duty admirably.

[32] The two letters signed by the defendant (dated 27 November 1996 and 3 December 1996) wherein the defendant had claimed to act for the vendor were irrelevant and insignificant in so far as they purport to warrant that the defendant was authorized to act for the vendor for it cannot be well nigh said that they constitute an express warranty on the part of the defendant which had induced the plaintiff to pay the money to the defendant. When the letters were written, the parties had by themselves agreed to purchase the land. All that can be said of the letters at most is they purport to claim that the defendant was authorized to act for matters after the event — that is to say after the plaintiff had already on its own been deceived by the imposter.

[33] A third party proceeding is essentially an independent proceeding between the defendant and the third party. If the plaintiff intends to obtain judgment against the third party, it would have to apply to add the third party as a defendant under O 15 r 6 Rules of the High Court 1980. It follows in this instance that the third party is absolved from liability by reason that the plaintiff had failed against the defendant.

Third party absolved from liability.

Reported by Sally Kee